CORRESPONDENCE

The Editor,
Annual Law Review.

Dear Sir,

The Elements of Drafting—A Defence

The Elements of Drafting, by E. L. Piesse and P. Moerlin Fox, published in its present form in 1951, received a severe and even savage review in the pages of your journal, over the initials "P.B." in (1951) 2 Annual Law Review 193. The review contains some valid criticisms, but as many which miss their mark. Though the authors are bound to preserve a seemly silence, their champion unsought may enter the lists.

"P.B." attacks Chapter 2, "Some Rules Relating to Deeds", on the ground that the "driblets of information" it contains will be already known to anyone who wants to buy the book. But the very purpose of this book is as a students' book, with other readers free to skip or read as desired. And students notoriously do not know everything; just as, notoriously, they often know very little, nay even nothing. Even a driblet may well seem a lusty drink.

The editors are then attacked for inserting a sentence on the use of commas in enumeration (the last sentence of the first paragraph on page 93), which sentence is said to cast doubt on what has just been said. To the writer, it provides the solution to the just-stated problem, of reconciling the old principle of *tot verbae, tot commae,* and the current tendency to omit the comma wherever possible.

As a partial answer to the criticism of the passage "on pages 115 and 116 concerning the effect of the phrase 'subject to contract'.", we point out that nothing at all is said on page 115 of this effect. The statement in the review that "the use of the phrase 'subject to contract . . . makes the *offer* or *acceptance* conditional, with the result that there is no contract" differs little from the book's "It is a question of construction whether the execution of a further contract is a condition, in which case there is no enforceable contract until the condition is fulfilled, or it is merely an expression of the intention of the parties as to the manner in which the transaction will be carried out", except that this latter is the accurate statement of the law.

The criticism that "the editorial italicisation of the opening words of the first text-sentence on page 71 leads the reader to think

that the italicised words are a sub-heading" is perhaps best met by saying that they are a sub-heading.

On the question of the title to which Coke is entitled, "P.B." is of opinion that the correct and only correct one is "Sir Edward", and that "Lord" is wrong. Strictly speaking it probably is, as the College of Heralds would agree. Yet the legal fiction that he was "Lord Coke" has so long existed that the phrase is barely objectionable in a legal work, especially on so ancient a subject as conveyancing. The form that commended itself to Lord Blackburn (*Foakes v. Beer,* (1884) 9 App. Cas. 605, at 615, 616) and Kenny (*Outlines of Criminal Law* (15th edn., 1936), 146) is one of which there is little need to be ashamed, even if it be a tribute to the fact that Coke was the first Chief Justice of King's Bench to be styled *Lord* Chief Justice (see *Acts of the Privy Council,* 1615-1616, p. 650, and the entry on Coke in the Encyclopaedia Britannica), rather than to pedantic accuracy. Incidentally, the review refers to "Lord Coke" on page 51! The reference is to page 15.

The next criticism points out that the Judicial Committee of the Privy Council does not give *judgment,* but tenders *advice,* and refers to p. 87. At that page of the book there is a reference to the "judgment" of the Privy Council in *Attorney-General for New Zealand v. Brown,* [1917] A.C. 393.

To this the answer is conclusive. Although the Privy Council does only tender advice, the written document in which that advice is contained is correctly called its *judgment.* There is no *decision,* but the usage complained of in the review has the support of the very highest authority, in referring to a *judgment.* Thus it is used by Sir Frederick Pollock (*First Book of Jurisprudence* (3rd edn., 1911), 336, where Lord Cairns "delivers the judgment of the Judicial Committee"), by Sir John Salmond (*Jurisprudence* (3rd edn., 1910), 165, discussing the "judgments of the Privy Council"), and Sir William Anson (*Principles of the English Law of Contract* (19th edn., 1945), 189, "judgment of the Judicial Committee of the Privy Council"). And if Mr. Fox should still feel dubious, even in such distinguished company, he could take heart again by opening any volume of the authorised Appeal Cases reports. At the appropriate place he would read: "The judgment of their Lordships was delivered by . . . ", a clause which would introduce a speech ending with the words: "They will therefore humbly advise His Majesty" (see, for example, *Dajani v. Mustafa El Khaldi,* [1946] A.C. 383, at 391 and 400). In a case well known to all Australian practitioners, Lord Wright M.R. for

the Board gave authoritative approval to the nomenclature here supported in referring to "the judgment of this Board in *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd.*" (see *James v. The Commonwealth,* (1936) 55 C.L.R. 1).

The next statement made is "The members of the House of Lords do not give *judgments;* they make *speeches* (page 103)". There can be no doubt that this is correct—"the judgments of the law lords are referred to as 'speeches'" (Williams, *Learning the Law* (2nd edn., 1946), 9). If this is error, the author and/or editor remain in good company. See, for example, Lord Dunedin in *The Mostyn,* [1928] A.C. 57, 72, referring to "the judgments of your Lordships House", and Sir William Anson (*op. cit.,* at 226) referring to "Lord Macnaghten's judgment", "Lord Haldane's judgment" (at 227), "the judgment of Lord Loreburn" (at 341), and "the judgment of Lord Sumner" (at 349). The common usage here seems to be that the noble Lords make a speech which, when delivered in the House, becomes their judgment in that case. Thus all "advices" and "speeches" can conveniently be classed with the utterances of other Courts, as *judgments.* If this is not yet universal usage, it seems that it soon will be.

The last point demanding attention is the allegation that the book instructs its readers to "beware of using words like 'whereas'". If this means that the book says not to use 'whereas' the statement is simply wrong. Mr. Fox's own example on page 57 suggests the use of an introductory 'whereas'. What the book does say is that such words should be handled carefully, the usual tendency being to their over-use.

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Our reviewer writes:—

Mr. Hulme's comments are fairly stated and call for a full reply. 1. Mr. Hulme says that this is a students' book; Mr. Fox's preface, at p. vii, says that "the reprint was welcomed by many Australian solicitors." Moreover, the terms of chapter 1 create the impression that the book (as opposed to the lectures which formed the text of the first edition) is addressed to the practising solicitor rather than to the student. I therefore see no reason to change my opinion of

chapter 2; but my remarks were obviously no more than an expression of opinion, and other readers of the chapter will no doubt form their own conclusions.

2. Page 93—the use of commas in enumeration. Here again, each reader must form his own conclusion, but I remain of my original opinion, and prefer Mr. Piesse's original text.

3. Pages 115 and 116. The paragraph dealing with the effect of the phrase 'subject to contract' begins on page 115. I referred to the two pages because the first sentence on page 116, beginning "it is well settled that the use of such phrases", is hardly intelligible to a reader who does not turn back to page 115 to find out what phrases are "such phrases". Apart from this, I think that the paragraph is misleading in its reference to a "conditional contract", although I admit that the first two sentences on page 116 are almost verbatim (but unacknowledged) quotations from the judgments there mentioned.

The difficulty about statements such as "a contract 'subject to contract' is conditional upon the execution of a further contract" is that the word 'contract' means 'de facto agreement' where it first occurs and 'binding act-in-the-law' where it last occurs; the two 'contracts' are not the same. This difficulty is easily avoided by reference to a 'conditional offer or acceptance'.

As to the matter of accurate statements of the law, I doubt whether there is any longer a question of construction if the phrase 'subject to contract' is used: see *Eccles v. Bryant and Pollock,* [1948] Ch. 93, 94, 105. The judgment of Cohen L.J. in this case is noteworthy for the learned judge's avoidance of any reference to 'conditional contracts'.

4. I accept Mr. Hulme's statement that the italicised words on page 71 are a sub-heading; a comparison of the present text with page 41 of the first edition had led me to the wrong conclusion that they were not. I was sustained in my view by the difficulty of finding a subject for the verb 'confounds' other than the italicised words. If these words are to serve the double purpose of being a sub-heading and the subject of 'confounds', the usage is contrary to that generally accepted and employed by the authors elsewhere, for example, pages 108, 117. If, on the other hand, these words are a sub-heading only, the sentence which follows them is a striking example of shoddy English and misleading punctuation.

5. I agree with Mr. Hulme that current usage attaches the name 'judgment' to the advice of the Judicial Committee of the Privy

Council; I think the usage is reprehensible, but I was perhaps pitching my standards too high in expecting the authors to struggle against it. As to authorities, however, Maitland (*Constitutional History of England,* 463), Hood Phillips (*Principles of English Law and the Constitution,* 463), and Chalmers and Hood Phillips (*Constitutional Laws of Great Britain,* 6th edn., 189) place 'judgment' in inverted commas.

6. As to 'Lord Coke' and 'judgments' in the House of Lords, I cannot agree that usage sanctions these descriptions; Mr. Hulme himself seems doubtful. Modern usage, as opposed to that of, say, twenty-five or fifty years ago, prefers to give Sir Edward Coke his proper status. Mr. Hulme is correct in saying that the reference to 'Lord Coke' appears on page 15, not on page 51. I apologise for not noticing, when reading the proof, that the printers had inverted the order of the numerals.

As to 'speeches' and 'judgments' in the House of Lords, I think I can safely undertake to find at least one reference to 'the speech of Lord I' for every reference to 'the judgment of Lord Y' found by Mr. Hulme. It also seems to me that in his defence of the authors Mr. Hulme confuses the judgment of the House with the speeches of the individual members which lead to it.

7. My statement that the book instructs its readers to beware of using words like 'whereas' means precisely what it says. Page 57 does, I agree, suggest the use of 'whereas'—in a conveyance; but on page 56 draftsmen are advised to avoid the word in other documents, and another caution against its use may be found on page 3. Apart from this, I was doubting, not the advice, but the reason given for it (fear of annoying one's clients).

I am sorry that Mr. Hulme considers my review 'savage'. The first edition of the book consisted of reprinted lectures; but it has now attained the dignity of a second edition, and I feel that one is entitled to expect very careful editing, for the written word differs in many respects from the spoken word. In particular, I think that readers are entitled to expect their authors to practise what they preach—in this context, to endeavour to achieve exact comprehension and clarity (page 5).

I tried to make it clear that I liked the book, despite its many inaccuracies; I may add that on my recommendation it was adopted as a text-book for students in the Law School of the University of Western Australia.